SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 332.

F. MAY & CO., PLAINTIFFS IN ERROR,

versus

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

In Error to the Supreme Court of Louisiana, No. 12,957.

STATEMENT OF CASE.

F. May & Co. are located at No. 136 Chartres street, in the city of New Orleans. They are engaged in importing dry goods, *etc.* Their merchandise, or stock in trade, was assessed for State and municipal taxation in the year 1897 for $2500, and their bills receivable were assessed for the same purposes at $1000. F. May & Co. asked that these assessments be cancelled, on the ground that the taxes based upon the assessment are ~~interferences with importing commerce~~ duties upon imports.

F. May & Co. receive large consignments of goods which are not taken to No. 136 Chartres street, and which are shipped direct from a warehouse to their several customers. Such goods are not assessed, and this suit does not effect them in any way. The exemption from taxation of such goods is recognized by the State and City authorities. The cause depends entirely on the question whether the Legislature of a State can constitutionally require the importers of foreign

articles to pay a property tax upon certain property *after* the cases in which such merchandise has been packed are broken and the property removed therefrom. The stock of goods of F. May & Co. at No. 136 Chartres street is on the shelves of the store there located, and it is not in the original cases in which it has been received by F. May & Co.

It is contended, on behalf of the City of New Orleans, defendant in error, that the breaking of the cases in which the goods were imported and received, and the removal of the goods from the cases, have had the effect of so mingling that merchandise with the mass of the property in the State, as to withdraw it from under the protection of ~~the commerce clause~~ of the Constitution of the United States.

Argument.

Mr. Chief Justice Marshall, in *Brown vs. Maryland*, 12 Wheat., 441 and 442, says:

> There must be a point of time when the prohibition ceases and the power of the State to tax commences; we can not admit that this point of time is the instant that the articles enter the country. * * * It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of the property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the State; and, while remaining the property of the importer in his warehouse *in the original form or package in which it was imported*, a tax upon it is too plain a duty on imports to escape the prohibition in the Constitution.

Has the point of time, when the prohibition ceases to protect the merchandise assessed in this case, and the power of the State to tax it, commenced?

The Court say that this point is not the instant that the articles enter the country. It is at some subsequent point of time. It is submitted that the Court, in *Brown vs. Maryland*, clearly lays down the doctrine that the point of time has arrived when the importer breaks up the original packages

for the purposes of sale or for use, or changes the form in which they were imported, or when they pass to second hands. When any one of these things is done the merchandise loses its distinctive character as imports and becomes subject to the taxing power of the State.

The evidence in the record abundantly shows that F. May & Co. are in the habit of importing goods which have been packed in cases for the purpose of shipment; that they take some of those cases to their store at No. 136 Chartres street, where the cases are broken and the goods therein contained are delivered to their various customers. The testimony on this point is to be found on pages 6 *et seq.* of the transcript of record, and is in part as follows:

> Q. Will you please state what was the business of your firm in 1897?
>
> A. Our business was this: we go to Europe and call on the different manufacturers there, obtaining from them samples which they send to us here in New Orleans; with those samples we call upon the trade of New Orleans and other cities and take on those samples what is known as import orders. These orders we then forward to the different manufacturers in Europe and the goods are shipped to us; those are what are known as import orders. Besides that, if we think any article is good we place what is known as stock orders; that is, we order goods from there for our own account. * * * *
>
> Q. And when you go to deliver those towels do you break any of the packages in that wooden case?
>
> A. Five hundred dozen towels would represent 100 packages of five dozen in each package. Now, some of the cases containing such goods may not come to the store at all; the cases may go right to the customer unopened. *But if there are in that case two or three orders, then we bring the case to the store and open it and take out the different orders;* but we never open any of the packages in the case. * * *
>
> Q. This book I now show you is your own book?
>
> A. That is my own order book. Here is an order from Leon Godchaux for thirteen thousand yards of coating; these goods were ordered to be shipped to New York City; they never came to our store. Now, there is an-

other order—we never even opened that case. *We never open a case unless there happens to be in the same case goods intended for different customers, then we bring the case to the store, open it and separate the goods for the different customers.*

* * * * * * *

Q. What is the percentage of your business, consisting of import orders?

A. That would be hard to say exactly; I would say that 60 or 65 per cent. of our business is done by orders. Of course, some goods in stock are sold to some parties who give us orders, jobbers in New Orleans, Cincinnati and other cities.

Q. Those goods are sold in the same way?

A. Yes; only *they have been taken out of the cases and put in stock.* * * *

Q. Then the goods that come to you are the goods of F. May & Co.?

A. Yes.

Q. I see here an order for twenty-five gross of lace edging; does that twenty-five gross of lace edging compose a complete and original package?

A. Yes—I will explain that—a gross consists of twelve pieces of lace and each piece is twelve yards; twelve pieces of twelve yards each are put in a box and there is paper around that box, and twine tied around the paper. And that is what I consider an original package; twenty-five gross would represent twenty-five packages.

Q. They are put in cartoon or paper boxes?

A. Yes.

Q. And those cartoons or paste-board boxes are put into another box?

A. They are put in a case. * * * If one case contains only one order, we send the case directly to the man who gave the order; *if it happens to contain two or three orders it comes to the store; the case is opened and the orders separated.*

* * * * * *

Q. Look at the next order—what does that represent?

A. That would represent two cartoons of lace, not enough to make a case.

Q. That is, two small paper board boxes of lace?

A. Yes.

Q. Did you receive those two boxes of lace just as you sold them, or did they come in a case?

A. They came in a case with another order.

Q. Now, look at the one next to that?

A. That also came in a cartoon.

Q. And that cartoon was with other cartoons in a large case?

A. Yes.

Q. And the next one?

A. The same reply applies to that.

Q. None of these cartoons came to you, except put together with other cartoons in a large case?

A. Yes.

Q. And the next one?

A. The same reply applies to that.

Q. None of these cartoons came to you, except put together with other cartoons in a large case?

A. They all came in a case, and the whole case might not have been intended for one customer.

Q. It was not always so in 1897, that the goods in one case went to one customer?

A. No.

Q. Different articles came in the same case, intended for different customers, and you opened the cases and delivered the articles to the different customers?

A. Yes; but one case contains only lace, another towels, another bobbinet, *etc.* * * * *

Q. How would you do with your stock goods?

A. Anything we have in stock we sell.

Q. What do you mean by stock?

A. Suppose a man was to come in the store to buy bobbinet; we explain to him that he would have to buy at least one package; that we would not sell one piece only; that we only sold in packages; we have packages of two, three, and four, in each package.

Q. And those packages are put in a larger case, of how many in each case?

A. That varies—30, 40 or 50 * * * bobbinets would come in a case, but we don't sell them by the case. * * *

Q. But these packages were in stock—they were on the shelves of your store?

A. Yes, in the original packages—what I consider the original packages. * * *

Q. Now, what credits or bills receivable were there of your firm in 1897?

A. Our bills receivable consisted of simply money due to us by customers who had given orders that had been filled, and which they had not paid for. * * * * We had bills receivable only.

Q. And they were what you have just stated—money due you upon imported goods sold by you?

A. Yes.

Q. Some of which goods were sold in those cartoons as you describe, and not in the original packages?

A. Some of which were sold out of stock and some on import orders.

Q. I want to get a thorough explanation of the way you get these goods; say a dozen or more packages of goods are shipped by the manufacturer in a wooden box for convenience; as I understand, many of those cases go direct to your customers?

A. A great many.

Q. And in other cases, where they contain more than one order, the cases are opened by you and the orders separated?

A. Yes; but the order is generally sent in the case itself, the goods may be shipped in a wrapper, by express; the case does not signify that that is an original package; the original package is the one in which the goods are put up at the manufactory. If a manufacturer puts up five dozen towels in a package that package is the original package, and if I open that package I break the original package; but whether he puts those packages in a case or not, it remains in the original package. The original package is the original wrapper put around the goods at the factory, and is known as such in the trade.

The Supreme Court of Louisiana hold that the breaking of the cases in the manner indicated in the record is such a change of the form in which those cases of goods were imported, that they have lost their distinctive character as imports, and that the assessment and taxation thereof were constitutional and valid.

This is, it is submitted, in strict line with the decisions of the Court in *Brown vs. Maryland* and *Low vs. Austin*, 13 Wallace, 34. The Supreme Court of Louisiana, under these decisions, in deciding that the State of Louisiana could not impose a license tax upon the business carried on by Gelpi & Bro., importers, held that:

> A package means a bundle put up for transportation or commercial handling. It is a thing in form to become, as such, an article of merchandise for transportation or

delivery from hand to hand. *United States vs. Goldback*, Hughes Reps., Vol. 1, page 528. The breaking or destroying entirely of the package is a *clear* definition which does not admit of comment. *State ex rel. Gelpi & Bro. vs. Board of Assessors et al.*, 46 An. 147.

The same rule of construction is laid down by the Supreme Courts of the several States, as well as by the Federal Courts, in passing upon questions of commerce between the States.

The authority for such application is laid down in *Brown vs. Maryland*, page 449, in the following language:

> It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State.

In *Guckenheimer et al. vs. Sellers et al.*, 81 Fed. Rep., 997, Judge Simonton says:

> It appears that the original package is the package delivered by the importer to the carrier at the initial place of shipment, in the exact condition in which it was shipped. If in single bottles, shipped singly, or if in packages of three or more securely fastened together, and marked, or if in a box, barrel, crate or other receptacle, the single bottle, in the one instance, the barrel, box, crate, or other receptacle, respectively constitute the original package. * * * If the package be broken after such delivery it comes within the police regulations of the State.

In *State-Cochran vs. Winters*, 44 Kansas, 723, 10 L. R. A., it is said:

> The original package * * * was and is the package * * * as it existed at the time of its transportation from one State to the other.

In *McGregor vs. Cone*, Lawyers' Reports, Annotated, No. 39, page 484, Chief Justice Deemer of the Iowa Supreme Court, in defining an original package, says:

> All the cases agree that once the article is sold by the importer it then becomes subject to the taxing and police power of the State; and it is quite generally held that the

same result occurs when the original package in which it is imported is broken and the several parcels are so mingled with other property, or so exposed for sale as to destroy the identity of the package as imported. * * * What is an original package. The definition commonly accepted and believed by us to be correct, is that it is a bundle, put up for transportation or commercial handling and usually consists of a number of things bound together, convenient for handling and conveyance. * * * It is quite apparent, we think, that the words original package have reference to a unit which the carrier receives, transports and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form, or broken and transformed, it is the subject of interstate commerce. But when sold or broken, or when it changes form, it ceases to be an article of interstate commerce and no longer enjoys its protection. The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received; for, if the package be broken after such delivery, it, by that act alone, becomes a part of the common mass of property within the State and is subject to the laws of that State passed in virtue of its police powers. * * * (With reference to the Coonan case in Iowa, Mr. Chief Justice Deemer says): We have already seen that the Collins case should not be regarded as authority upon the proposition involved, and an examination of the *Beine* case will disclose that it does not hold to any such rule. The contrary seems to be the holding in that case. * * * We are abidingly convinced that the *Coonan case*, if it holds to the doctrine contended for by the appellant, is wrong, and ought to be overruled; and insofar as it may be said to be out of harmony with this opinion and the great weight of reason and authority, it is over-ruled.

In *Keith vs. State* (*Ala.*), 10 L. R. A., 430, it was held:

That when intoxicating liquors are imported in small bottles, each of which is wrapped in paper and labeled "original package," the bottles being packed, for the purpose of facilitating the shipment, in an open box

marked with the number and size of the bottles contained therein, the box, and not the bottle, is the original package.

It is submitted that the assessment complained of by F. May & Co., of their merchandise, located in their store at No. 136 Chartres street, not in the original packages or cases in which it was imported, as well as the assessment of bills receivable for like stock which had been sold, are good and valid assessments; and that the judgment of the Supreme Court of Louisiana should be affirmed.

Respectfully submitted,

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Of Counsel for the City of New Orleans, Defendant in Error.

New Orleans, December 20, 1899.